

**Vincent M. Ippolito, Inc. and Bergen Enterprises Co. and Local 825, International Union of Operating Engineers, AFL-CIO.** Cases 22-CA-17521, 22-CA-17548, and 22-CA-17589

February 28, 1994

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND TRUESDALE

On March 15, 1993, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified.<sup>3</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent additionally argues in its exceptions that the judge was biased against its position in this case. We have carefully reviewed the record and find no merit in this argument.

<sup>2</sup> In finding that the Respondent's mechanics would not constitute a separate appropriate bargaining unit as a craft, the judge inadvertently relied on *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), the case in which the Board defined the standard for severance of a craft unit from an existing bargaining unit. Inasmuch as the instant case involves the initial establishment of an appropriate unit, rather than a severance issue, the standard relevant here was set forth in *E. I. du Pont & Co.*, 162 NLRB 413 (1966), in which the Board considered "the absence of a bargaining history on a more comprehensive basis, [and] the separate identity of the functions, skills, and supervision" to determine whether a craft unit limited to electricians would be appropriate for bargaining. Based on these considerations, we agree with the judge that the mechanics do not constitute an appropriate craft unit.

The judge inadvertently erred in stating that the Respondent offered no explanation for its unilateral changes in working conditions. We agree with the judge, however, that the Respondent did not satisfy its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of demonstrating that the unilateral changes were made for valid business reasons. We note that the Respondent's vice president, Jim Ippolito, testified that the changes in working conditions were necessary because employees Bob McQuade Jr. and Sr. turned in their keys to the facility. The judge, however, discredited Jim Ippolito's testimony in its entirety.

<sup>3</sup> Because the judge inadvertently omitted the standard narrow injunctive provisions from his recommended Order and notice to employees, we shall modify the recommended Order and substitute a new notice to provide for such relief. Additionally, we shall modify the reinstatement and make-whole paragraphs of the recommended Order to conform to standard remedial language. Finally, we shall modify the notice-posting paragraph of the recommended Order to reflect the fact that the Respondent's facility is located in Teaneck, New Jersey, not Tenafly, New Jersey.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Vincent M. Ippolito, Inc. and Bergen Enterprises Co., Teaneck, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(j).

"(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraphs 2(b) and (c) and reletter the subsequent paragraphs.

"(b) Offer Ted Botsucos and Iva Newman immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision."

3. Substitute the following for newly relettered paragraph 2(g).

"(g) Post at its Teaneck, New Jersey office and facility copies of the attached notice marked 'Appendix.'<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material."

4. Substitute the attached notice for that of the administrative law judge.

**APPENDIX**

**NOTICE TO EMPLOYEES**  
**POSTED BY ORDER OF THE**  
**NATIONAL LABOR RELATIONS BOARD**  
**An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to recognize and bargain collectively with Local 825, International Union of Operating Engineers, AFL-CIO with respect to wages, hours, and other conditions of employment of the employees in the unit set forth below:

All operators, welders, mechanics and painters employed by Respondent at its New Jersey facil-

ity excluding all office clerical employees, truck drivers, professional employees, guards, and supervisors as defined by the Act.

WE WILL NOT withdraw recognition from the Union as the exclusive collective-bargaining representative for our employees in the unit described above.

WE WILL NOT unilaterally change our employees' hours of work, and cease our practice of paying employees for lunch and breaktime, or remove a telephone used by employees because of their membership in and activities on behalf of the Union.

WE WILL NOT state to employees that it would be futile to select the Union as their bargaining representative, or that we would never sign a collective-bargaining agreement with the Union.

WE WILL NOT interrogate employees about their membership in or activities on behalf of the Union.

WE WILL NOT threaten employees with loss of overtime work because of their membership in or activities on behalf of the Union.

WE WILL NOT threaten employees with plant closure and other unspecified reprisals, because of their membership in or activities on behalf of the Union.

WE WILL NOT solicit grievances and promise employees improved working conditions because of their membership in or activities on behalf of the Union.

WE WILL NOT discharge employees because of their membership in or activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain, on request, with the Union in good faith as the exclusive bargaining representative of the employees in the unit described above and, if an agreement is reached, embody such understanding in a signed agreement.

WE WILL offer Ted Botsucos and Iva Newman immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL restore the terms and conditions that were in effect when we changed our employees' hours of work and ceased paying them for lunch and breaktime and WE WILL make them whole for such monetary loss, plus interest.

WE WILL replace the telephone usually used by employees.

WE WILL remove from our files any reference to the terminations of Ted Botsucos and Iva Newman and WE WILL notify them in writing that we have done so and

that the terminations will not be used against them in any way.

VINCENT M. IPPOLITO, INC. AND BERGEN ENTERPRISES CO.

*Tracy Galligan, Esq.*, for the General Counsel.

*Richard J. Delello, Esq. (Grotta, Glassman & Hoffman)*, for the Respondent.

*Gary Carlson, Esq. (Schneider, Cohen, Solomon, Leder & Montalbano)*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on December 16, 17, 19, 20, and 30, 1991.

Upon charges filed by Local 825, International Union of Operating Engineers, AFL-CIO (the Union) against Vincent M. Ippolito, Inc. and Bergen Enterprises Co. (Respondent), an order consolidating cases and complaint issued on November 14, 1991. The complaint alleged various violations of Section 8(a)(1), (3), and (5).

On the entire record, including my observation of the demeanor of the witnesses and the posttrial briefs filed by counsel for the General Counsel and counsel for Respondent, I make the following

### FINDINGS OF FACT

Respondent is composed of two interrelated corporations, which are affiliated business enterprises with common officers, ownership, and supervision, and formulate a common labor policy. These enterprises interchange personnel with each other and hold themselves out to the public as a single interrogated enterprise. The parties stipulated that Respondent is a single employer within the meaning of the Act. Respondent is incorporated in the State of New Jersey and operates a single facility in Teaneck, New Jersey, where it operates the business of a garbage disposal contractor. During the course of such operation, Respondent annually derives revenues in excess of \$50,000 from the provision of such services to various townships and commercial enterprises located in the State of New Jersey and annually purchases and receives at its New Jersey facility goods and materials valued in excess of \$50,000 directly from points located outside the State of New Jersey. It is admitted, and I find, that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The supervision of Respondent's operation is controlled by the Ippolito family. Vincent, the father and president, used to be in overall charge of the operation. Although he still regularly works at the facility, the overall individual presently in charge of the facility is James or Jim Ippolito, Vincent's son, and vice president. The other supervisors and corporate officers of Respondent are Steve Ippolito and Ricky Ippolito, also vice presidents, Jim's brothers, and Vincent's sons. Respondent is a family corporation. It is admitted that the above-named Ippolitos are all supervisors within the

meaning of Section 2(11) of the Act. Roger Ippolito, another son works for Respondent, essentially repairing tires. There is no evidence that he should be excluded as an employee under Section 2(3) of The Act, or as a close relative with special circumstance. Cf. *NLRB v. Action Automotive*, supra. This issue is more fully discussed below.

Respondent's operation employs approximately 20 drivers and 13 helper lifters on its trucks. These employees are represented by Local 945, International Brotherhood of Teamsters (Local 945). Respondent's facility is essentially divided into three areas. One area is the transfer area where the garbage trucks enter through open overhang doors. Here the garbage is dumped, sorted and processed. Respondent employs two regular full-time and one regular part-time employees called transfer station or station employees. There is an issue as to whether the regular part-time employee is includable in an appropriate unit. Another station employee was on layoff with a questionable expectancy of return. There is an issue as to whether he is includable in an appropriate unit. Another area is the shop area. The shop area is separated from the station area by a common wall. There is a doorway that connects the two areas. The shop area employs six shop employees, two welders, and four mechanics. In addition to the above production and maintenance employees, Respondent employs Roger Ippolito who repairs tires and performs other miscellaneous type functions. Roger Ippolito, as set forth above, is part of the Ippolito family. He is the brother of Vincent. There is an issue as to whether he is part of in appropriate unit. A summary of the alleged appropriate unit is as follows:

Bob McQuade Jr., mechanic (Respondent contends he is a supervisor).  
 Bob McQuade Sr. shop mechanic.  
 Iva Newman, shop mechanic-welder.  
 Des Moines Chaney, welder  
 Roger Ippolito, tire room employee. (General Counsel contends he should be excluded.)  
 Bernie Hammer, mechanic. (Charging Party and General Counsel contend that as a member of Local 945, he should be excluded from the unit.)  
 Charlie Billings, helper general all-round man. (Charging Party contends Billings is not a regular part-time employee.)  
 Gerard Gansel, station employee.  
 Ted Botsucos, station employee.  
 Billy Kelleher (Respondent contends he was not employed at time of alleged recognition).

Respondent also employs approximately five clerical employees who work in a separate area of Respondent's facility. The shop employees, station employees and clerical employees are unrepresented by any labor organization. General Counsel contends that an appropriate unit consists of the station and shop employees. Respondent contends that the appropriate unit consists of the shop employees only.

The transfer station could accurately be called the production end of Respondent's facility. The garbage trucks pick up their loads at Respondent's customers location and unload them when they return from their routes at the transfer station. The garbage is simply dumped on the floor of the transfer station. It is then processed and sorted for eventual delivery elsewhere. To perform these functions, the station em-

ployees use a conveyor belt, bobcat, bulldozer, buckloader, and forklift. The shop employees essentially maintain this equipment and trucks. When transfer station equipment needs repair, a transfer station employee walks into the shop and announces what piece of equipment has broken down. Most of the repairs that occur are what could usually be described as routine, and any available mechanic or welder will repair the equipment. Welders are usually capable of making most repairs. This repair work is not especially complex work. If a particular repair is reasonably complicated or it involves a knowledge of hydraulics, the station employee would go to McQuade Jr., only because he is the best mechanic, and the only shop employee with knowledge of hydraulics. McQuade Jr. is classified by Respondent as a shop foreman and has worked for Respondent continually for 10 years. In addition to repairing the shop equipment the shop employees also repair and maintain Respondent's trucks. Often, transfer employees would assist the shop employee in making a repair. For example, a transfer employee might fetch a particular tool for a mechanic, hold a wrench, or other tool and provide physical assistance when needed.

Shop and transfer employees share a common breakroom where they would take morning breaks and have their lunch together. Both groups of employees are hourly paid employees, including McQuade Jr. The transfer room employees generally receive less of an hourly rate than the shop employees. This is presumably because of the different degree of skill involved. McQuade Jr., a senior employee with the most knowledge and experience, is the highest hourly paid employee. All employees receive time and a half for overtime worked after 40 hours, except McQuade Jr., who receives double time. Both the shop and transfer employees receive the same health insurance benefits. There is no evidence that shop employees receive any benefits nor received by transfer room employees.

General Counsel contends that an appropriate unit for bargaining is a unit consisting essentially of all Respondent's production and maintenance employees, and excluding the drivers, who are already represented by another labor organization, and the office clerical employees, who are unrepresented. The Act does not require the only appropriate or the most appropriate unit; the Act requires only that the unit be an appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enf'd. 190 F.2d 576 (7th Cir. 1951); *Federal Electric Corp.*, 157 NLRB 1130 (1966); *Capital Bakers*, 168 NLRB 904, 905 (1967). Moreover, the Board has held the presumption of a single plantwide unit to be an appropriate unit. *Frisch's Big Boy Ill-Mar*, 147 NLRB 551 (1964). The fundamental factor in determining an appropriate unit is the community of interest among the employees. *NLRB v. Action Automotive*, supra. Factors used by the Board in determining such community of interest include the method of wages; hours of work; employment benefits; nature of supervision; difference in training and skills; interchange of employees; functional integration; and history of bargaining and extent of organization. *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962).

Applying these considerations to Respondent's facility, the credible evidence establishes a high degree of functional integration. In this regard, when the trucks are unloaded at the Respondent's facility, the garbage is processed by the transfer station employees. The trucks and transfer station equip-

ment is maintained by the mechanics and Roger Ippolito, a tire maintenance employee. All maintenance and transfer station employees are hourly paid, work the same workdays, and approximately the same hours. They are commonly supervised by the Ippolitoes, particularly Jimmy and Ricky Ippolito, receive the same employee benefits, share a common breakroom and take their lunch and coffeekbreaks together. Their work rooms are adjacent to one another separated by a wall with an open entrance. There is some interchange of employees. Transfer employees often assist the mechanics in the repair of equipment performing physical, nonskilled functions. At other times transfer station employees clean the maintenance shop area. At other times the transfer station employees would pick up ordered parts for the maintenance employees. These factors clearly establish that a production and maintenance unit is an appropriate unit.

Respondent contends the mechanics constitute a craft and should be represented as a separate unit. Whether a particular group of employees constitutes a separate craft status to warrant their exclusion from a plantwide unit is determined by the standards set forth in *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966). The cases following *Mallinckrodt* have almost uniformly rejected craft severance. It is very difficult to establish a craft unit under *Mallinckrodt*. For example in *Dow Chemical Co.*, 202 NLRB 17 (1973), the Board denied petitions for severance of five separate groups of craftsmen (electrical workers, pipe fitters, painters, sheet metal workers, and carpenters) on the ground that they shared substantially common working conditions and benefits with production employees, and that their work was highly integrated with the employers entire process. In *La-Z-Boy Chair Co.*, 235 NLRB 77 (1978), the Board refused to sever tool-and-die employees from a production and maintenance unit because among other considerations there was a high degree of functional integration and common supervision.

I conclude that in view of the high degree of functional integration, the common supervision, common working conditions, and benefits, Respondent has failed to establish that its maintenance mechanics constitute a craft unit. Moreover under *Mallinckrodt*, I conclude Respondent has failed to establish that its mechanics have the skills necessary to even qualify them as a craft. In this connection McQuade Jr. is the most skilled mechanic. The other employees all have skills well below those of McQuade Jr. The evidence established that McQuade has to help them with much of their repair work because they lack the skill.

Considering the eligible employees in the above appropriate unit, Respondent contends that McQuade Jr. is a supervisor within the meaning of Section 2(11) of the Act. General Counsel contends that although he is the most knowledgeable mechanic with long seniority, he is at best a leadman, notwithstanding his title as shop foreman, and an employee within the meaning of Section 2(3) of the Act.

During the first day of this trial when McQuade Jr. was testifying, I asked Respondent counsel whether Respondent was contending that McQuade Jr. was a supervisor. Jim Ippolito, who acted in the function as general manager and was sitting at Respondent's counsel table, conferred for several minutes with his attorney who stated that Respondent was not contending that McQuade Jr. was a supervisor within the meaning of the Act. McQuade Jr. completed his direct and cross-examination the first day of the trial. His testimony

if credited established the validity of his union card and the cards of other employees, that he was the employee most responsible for the employees seeking union representation, and the employee to whom all alleged unlawful interrogations were directed. It is interesting that the following trial day Respondent amended its position through its attorney to first contend that McQuade Jr. was a supervisor. I find such amendment highly suspicious, and made in bad faith, with an intention to establish supervisory interference with the entire union organization and a disqualification of all the union cards as being unlawfully solicited by a supervisor as well finding that all alleged unlawful interrogations were made to a supervisor, and thus not unlawful. Thereafter, when Jim Ippolito testified several days later concerning his business operation, he repeatedly began every sentence relating to McQuade Jr. as "my supervisor" and "my boss." This constant reference to McQuade Jr. was so repeated and exaggerated that one could conclude, if Jim Ippolito were credited, that before Jim Ippolito went to the bank, or took his lunch, or went to the men's room, he asked McQuade Jr. whether it was alright. Further, in connection with the discharge of Newman, discussed below, Respondent, in its position paper submitted by its attorney, who presumably drew it up pursuant to conversations with the four Ippolitoes, set forth in connection with Newman's discharge that during the meeting with Newman and McQuade Jr. which led to his discharge, Newman "lost control and screamed 'I don't have to listen to this shit' and began to leave." It was at this point that Newman was fired for insubordination. Yet the testimony of the Ippolitoes on this significant issue failed to establish that Newman used any vulgar or curse words, as alleged in Respondent's position statement, but rather left the meeting when no one said anything further, and was fired because he left the meeting without permission. I conclude this contradiction seriously and adversely affects the credibility of all the Ippolitoes. Moreover, throughout the testimony of the Ippolitoes, their testimony impressed me at times as vague, at other times as not responsive, and at frequent times grossly exaggerated in support of their position. I was most unfavorably impressed with their demeanor, and where their testimony is in conflict with that of General Counsel's witness, I credit General Counsel's witness.

Additionally, I was generally impressed with the demeanor of General Counsel's witness. They had a good recollection of the facts and were forthright during both direct and cross-examination. Any contradictory testimony by General Counsel's witnesses was insignificant, in my opinion, and the type of contradiction that one might expect from a truthful witness.

The credible testimony of McQuade Jr. establishes that, although he is classified as the shop foreman, he has no independent authority to hire, fire, promote, transfer, discipline, or effectively recommend such action. The credible evidence also establishes that he does not assign work to employees using independent discretion. Rather, he would handle the most difficult jobs himself since he is the most experienced worker. As to other employees, he often explains to them how to do a job, or works with them on certain jobs because he is the most experienced worker.

There is no evidence that the employees consider McQuade Jr. to be a supervisor. Moreover, Respondent did not consider McQuade Jr. to be a supervisor until the second

day of the trial when they heard his testimony as to his participation in the organization campaign and the independent 8(a)(1) allegations. In this connection, I find it significant that in connection with the incident involving employee Chaney's tools, described below, McQuade and Newman, an admitted employee, were reprimanded together. Supervisors are not usually reprimanded in the presence of rank-and-file employees.

In addition McQuade Jr. is an hourly paid employee who receives the same benefits as the other employees. He receives the highest rate of pay only because he is the most experienced mechanic.

Further, there are only six mechanics and five transfer station employees including McQuade Jr. Excluding the clericals, these are the only employees working at Respondent's facility. The other employees are drivers who spend most of their time on the road and are supervised over the phone by a dispatcher. Thus it appears that the 4 Ippolitoes are available to supervise the 11 shop employees, which are the transfer station employees and maintenance mechanics, including Roger Ippolito, the tire maintenance mechanic. Thus it appears that the ratio of 4 owner supervisors to 11 employees is such that McQuade Jr.'s supervisory status is doubtful. This doubt is magnified by Jimmy Ippolito's incredible testimony that he supervised the whole shop by himself until about 7 years ago when he hired McQuade Jr. who was an experienced mechanic. According to Jimmy, McQuade Jr. "just kind of took over" as supervisor. At this time Respondent employed only one other mechanic. Thus, if Jimmy is to be believed, this mechanic had his personal full-time supervisor.

Additionally, McQuade Jr. spends almost all of his time performing manual mechanical work.

Respondent contends that McQuade Jr. recommends the hiring of other employees. In this connection Respondent specifically contends that he recommended hiring his father McQuade Sr. and that by giving work tests to employee applicants, he effectively recommends their hire. I conclude that the giving of routine mechanical tests and reporting his impression of the results of such test is insufficient to establish that he effectively recommends hiring within the meaning of the Act. The same is true as to his recommendation of his father which probably came about in response to Jimmy Ippolito's asking him if he knew any experienced mechanics and his response that his father was an experienced mechanic.

Respondent also contends that McQuade orders in excess of \$100,000 worth of routine replacement parts as necessary in the course of a year. However, he cannot order equipment, and if it becomes a question of whether to repair a piece of equipment or replace it Jimmy Ippolito would make that determination. Moreover, such alleged purchase duties are routinely performed by management employees, who are not supervisors within the meaning of the Act.

On the basis of the above facts and discussion, I conclude that McQuade is not a supervisor within the meaning of Section 2(11) of the Act.

The undisputed evidence established that Bill Kelleher was employed by Respondent as a mechanic on August 16 when he signed a union card. The evidence also established that he was not employed by Respondent on October 25, the alleged date of recognition. Counsel for General Counsel con-

tends that Kelleher was on a leave of absence with a reasonable expectancy of recall. Respondent contends that he had extended his leave of absence for an indefinite period of time and had no reasonable expectation of returning. The record establishes that he was given a leave of absence because he wanted to be with his father who was dying. There is no evidence as to the specific length of time of such leave, if any. However, Kelleher admitted that he extended his leave of absence when after his father passed away, he failed to make a timely return. Rather, he did not return for an additional period of time because he became involved in another matter, unrelated to the death of his father. His total absence was approximately 3 weeks. Kelleher further admits that he realized that by extending his return he had in effect lost his job. In this regard he candidly testified: "I really needed a job and I had to come back and I asked them for my, you know, for my job back."

Respondent's counsel correctly contends, in my opinion, that such testimony cannot be twisted into an expectation of recall by Kelleher. Moreover, Kelleher's past record establishes that over his 8- to 9-year period of employment he had left Respondent's employ a number of times and then returned seeking employment. Accordingly, I conclude that Kelleher had no reasonable expectation of recall. The Board has held that where an employee's leave is indefinitely extended, there can be no expectation of recall. *Yawman Erbe of California*, 232 NLRB 935 (1977). Accordingly, I conclude that Kelleher was not an employee in the unit found appropriate for bargaining.

The Charging Party's counsel contends that Roger Ippolito, Vincent Ippolito's brother, should not be included in any unit found to be appropriate because of a close relationship with Respondent. Roger Ippolito did not sign an authorization card. The uncontradicted evidence established that Roger was a full-time tire man in the shop. His terms and conditions of employment were similar to the other shop employees. Roger performed the work of replacing worn out or damaged tires exclusively. At one point in time Roger's work was unsatisfactory and he was terminated. He was subsequently rehired. He was subject to the same supervision as the shop and transfer station employees. No evidence was submitted to establish that Roger received any special or favored treatment or any other reason why he should be excluded. The Board has held that in determining whether a relative of management should be included in a bargaining unit, the Board examines whether the individual shares a community of interest with the other employees. The specific criteria considered include level of pay, work load, and special treatment regarding attendance or punctuality, and the authority of supervisors to exercise authority over the individual. *NLRB v. Action Automotive*, 469 U.S. 490 (1985); *United Artists Theater*, 277 NLRB 115 (1985).

Based on the discussion and authorities described above, I conclude that Roger Ippolito should be included in any unit found appropriate.

The Charging Party contends that Charles Billings is not a regular part-time employee. Billings did not sign an authorization card. The evidence disclosed that during the period of August 16 and October 25 1990, Billings was working 3 to 5 days per week, performing unit work for Respondent. Although there is some evidence that Billings once performed personal work for the Ippolitoes, there is no evidence

submitted that the recent work he performed for Respondent was anything but unit work. *Oxford Chemicals*, 286 NLRB 187 (1987).

Accordingly based on the the discussion and authority described above, I conclude that Billings should be included in any unit found appropriate for bargaining.

Counsel for General Counsel and counsel for Charging Party contend that Bernie Hammer did not sign a union card because he was a member of Local 945, the labor organization representing Respondent's drivers, and that he is covered by the Local 945 contract with Respondent. However, no evidence was submitted that Hammer was a member of any labor organization. Hammer was a member and was covered by Local 945 when he was a driver for Respondent. However, sometime before the critical period in this case, Hammer transferred to the shop as a mechanic. There was no evidence that Hammer was thereafter a member of Local 945, or that his terms and conditions of employment were covered by the contract between Local 945 and Respondent. Following his transfer to the shop, Hammer performed mechanic's work exclusively.

Accordingly, based on the discussion above, I conclude that Hammer should be included in any unit found appropriate for bargaining.

In July 1990, Respondent's shop and station employees, dissatisfied with their working conditions, discussed among themselves the possibility of obtaining union representation. Among the employees involved in these discussions was McQuade Jr. As a result of these discussions, the employees decided to seek union representation and in response to this decision, McQuade Jr. met with several union representatives at the union office. The union representatives explained to McQuade Jr. the advantages of union membership and gave him various materials to distribute to the employees. A second meeting was scheduled for August 16 at the Union's hall.

On August 16 the second union meeting was held as planned. Respondent's employees attending this meeting were McQuade Jr., Bernie Hammer, Billy Kelleher, DesMoines Chaney, Ted Botsucos, and Gerard Gansel. Union representatives present were Les McCurrie and Ed Zarnock. During the course of this meeting the union representatives distributed union cards to the attending employees. McCurrie explained to the employees that by signing these cards, the employees were choosing the Union as their collective-bargaining representative. All the above-named employees, except Hammer, read and signed their union cards. Hammer apparently did not sign a card because he is still a member of Local 945, who represents the drivers, although there is no evidence that Hammer is covered by this agreement. The five signed cards were then returned to McCurrie. McCurrie then gave McQuade Jr. a few extra union cards for interested employees who did not attend the meeting.

Thereafter, on August 17, McQuade Jr. obtained a signed union card from Iva Newman and sometime before August 22 turned the signed card over to McCurrie.

On August 22, the Union sent Respondent a telegram advising them that they represented Respondent's station and shop employees, and requested that a meeting be scheduled to commence negotiations for a collective-bargaining agreement covering these employees. On August 23, Jim Ippolito,

Respondent vice president, sent the Union a responding letter that Respondent would meet with the Union. A meeting was thereafter scheduled by telephone for Respondent to meet with the Union on September 12, at Respondent's facility.

The same day Respondent received the Union's demand telegram Jim Ippolito called McQuade Jr. into his office and asked him if the employees had signed up for the Union. McQuade Jr. responded that all the employees had signed up. Jim Ippolito testified that he called McQuade Jr. to find out about the Union because McQuade was the "boss," the shop employees' supervisor, the man in complete charge.

On the day Respondent received the Union's demand letter, Jim Ippolito confronted McQuade Jr. privately and said, "You guys signed up for the Union?" McQuade replied that all the employees had signed up. I conclude such interrogation was unlawful and in violation of Section 8(a)(1). *Rossmore House*, 269 NLRB 1176 (1984).

The credible testimony of Newman established that on the same day as the unlawful interrogation of McQuade Jr., set forth above, took place, Vincent Ippolito came over to Iva Newman and told him that if the employees had a Union, they would no longer receive overtime work. I conclude such statement to be a threat of a loss of overtime work opportunity and a violation of Section 8(a)(1). *NLRB v. Okun Bros. Shoe Store*, 825 F.2d 102 (6th Cir. 1987).

Later, also on that same day, McQuade Jr. was again summoned to Jim Ippolito's office. Present were Vincent and Steven Ippolito. Jim Ippolito asked McQuade Jr. what was going on and how the Union came about. McQuade Jr. responded that there was a union guy outside. One of the Ippolitoes asked whether McQuade had met with this union representative. McQuade replied that he had met with him during his lunch period. I conclude such conduct to be an unlawful interrogation in violation of Section 8(a)(1). *Rossmore House*, supra.

The evidence submitted by counsel for General Counsel established that McQuade Jr., Newman, Chaney, Gansel, Botsucos, and Kelleher signed valid union cards. *Ona Corp.*, 261 NLRB 1378 (1982). Accordingly, based on the facts and analysis set forth in the paragraphs above, I conclude that McQuade Jr., McQuade Sr., Newman, Chaney, Hammer, and Roger Ippolito were the shop employees (welders and mechanics) employed by Respondent during the critical period herein and that Billings, Gansel, and Botsucos were transfer station employees employed by Respondent during the same critical period. There were a total of nine employees employed by Respondent in the unit found appropriate for bargaining. Of these employees, five signed valid union cards. Accordingly, I conclude that the Union represented a majority of Respondent's employees in an appropriate unit for bargaining at all times material herein.

I also conclude that based on Respondent's unlawful interrogations, described above, Respondent was aware that the Union represented a majority of its employees.

Sometime, during the last week in August 1990, the Union contacted Jim Ippolito. A meeting was scheduled for September 12 at Respondent's facility. Respondent's lawyer, Drew Bauman, was supposed to be present.

On September 12, McCurrie and Zarnock arrived at Respondent's facility to meet with Jim Ippolito and his lawyer as previously scheduled. Jim Ippolito told them that his lawyer was not available so that they could not proceed as

planned. Zarnock told Ippolito that if there was any question that the Union represented a majority of the employees he had the membership cards with him to prove majority status and took the cards from his pocket and fanned them like a deck of cards for Ippolito to look at. Ippolito was seated at his desk about 5 feet away from Zarnock at this time. There is no question in my mind that Ippolito was unable to read the cards or verify the signatures from this distance as General Counsel apparently contends. However, based on Respondent's interrogation of McQuade Jr., there is absolutely no doubt that Respondent was aware that the Union represented a majority of its employees. Consistent with this conclusion, Ippolito responded that he knew the Union represented the employees and that would be no problem. The parties agreed to meet at a later date.

Following this meeting Jim Ippolito called his attorney, Drew Bauman, and asked him what steps should be taken. Bauman told Ippolito that he knew a labor lawyer with whom he was friendly, Richard Delello, and would contact him. Bauman contacted Delello and briefed him on the facts. Delello suggested that it would be a good idea to take a look at the Union's proposed contract as a first step. Thereafter, pursuant to arrangements between the parties McCurrie faxed its contract to Delello. Delello thereafter contacted the Union and arranged to meet with their representatives on October 25 at an agreed-upon restaurant.

On October 25, the parties met as scheduled. Present for the Union was McCurrie and Zarnock. Present for Respondent was Bauman and Dellelo. The parties had lunch and made small talk unrelated to collective bargaining. Following lunch, copies of the Union's proposed collective-bargaining agreement were passed out to Delello and Bauman. Both attorneys looked over the proposed agreement and at various points asked the union representatives various questions which were answered. Respondent's attorneys commented that the Union's proposed wage was similar to the wages Respondent's employees were presently receiving. Respondent's attorneys then asked whether the Union's health and welfare plans were negotiable. Zarnock explained the Union's benefit package, its costs, and how Respondent could contain these costs so as to benefit from the plans. The meeting lasted about 2 hours. The parties agreed to meet again at some later mutually agreeable date.

On November 1, Bauman, by letter, advised McCurrie that he had mailed a copy of the Union's proposed contract to Jim Ippolito for his review. The letter stated as follows:

I have mailed a copy of the proposed contract to Mr. Ippolito for his review. As per our conversation and discussion, we are aware that the Welfare Fund issue in Article VIII is non negotiable, but that other issues such as salary and annuity fund are negotiable. Since I will not be back from my vacation until November 14, 1990, please be advised that you will not hear from us until after that time. I will then contact you to give our proposal to the contract.

Thereafter, the Union made several attempts to arrange for another meeting, but was unsuccessful. On January 28, 1991, the Union sent a telegram to Respondent stating that if the Union did not receive a response to its proposals within 5 days, it would be forced to file unfair labor practice charges

with the NLRB. On February 4, 1991, Dellelo, by letter, advised the Union that Respondent doubted the Union's majority status.

The facts establish that Respondent met, recognized, and thereafter bargained with the Union and later withdrew recognition. The Union's August 22 letter to Respondent, claimed that it represented a majority of Respondent's production and maintenance employees and demanded recognition. As set forth and discussed above, the Union did represent a majority of Respondent's employees in an appropriate unit for bargaining. Shortly thereafter union representatives met with Jim Ippolito. At this meeting, the union representatives reiterated that they represented a majority of Respondent's employees and would gladly show him the signed union cards if there was any doubt. Ippolito conceded that the Union represented a majority. He knew this as a result of his unlawful interrogation. Thereafter an arrangement was made for Respondent's attorneys to meet with the union representatives. I also conclude that Ippolito must have informed its attorneys that the Union represented a majority of its employees otherwise there would have been no further meetings, and because in preparation for the meeting between Respondent's attorneys and the union representatives, one of Respondent's attorneys requested that the Union fax them a copy of their proposed contract. I conclude such action was taken so that Respondent would be able to bargain intelligently by becoming familiar with the Union's demands. Such request for the Union's proposals implies to me that recognition had already been extended. When the parties met on October 25, there was in fact negotiation on the Union's proposals. In fact Respondent's attorneys asked the union representatives whether their welfare and health plan was negotiable, after expressing no problems with the Union's proposed wages. Respondent's attorney's letter of November 1 further establishes that recognition and bargaining had in fact taken place by setting forth that a copy of the Union's proposals had been mailed to the Ippolitos with his comments on what proposals were negotiable and which were not negotiable, and a promise to contact the Union and submit its counterproposals.

The Board has consistently held that where an employer concedes that a union represents a majority of its employees and thereafter makes a commitment to bargain, a unilateral withdrawal from further bargaining violates Section 8(a)(5) of the Act. *Jerr-Dan Corp.*, 237 NLRB 302 (1978); *Jem Mfg.*, 156 NLRB 643 (1966). As set forth above, although Respondent did not actually check the Union's cards, it conceded their majority. Certainly Respondent's future action was predicated on an assumption of a majority. Clearly, not only was a commitment to bargain made by Respondent, but actual bargaining took place, and Respondent's representatives were prepared to submit counterproposals to the Union's proposals which were discussed when Respondent suddenly withdrew recognition. Under these circumstances, I conclude that Respondent recognized the Union as the collective-bargaining representative of its production and maintenance employees and engaged in collective-bargaining negotiations. I further conclude that by withdrawing recognition, Respondent violated Section 8(a)(5) of the Act.

On or about September 1990, McQuade Jr. was called into Jim Ippolito's office. All the Ippolitos were present. They asked McQuade Jr. what was bothering him and the other

employees. McQuade Jr. replied that there was dust in the garage, no heat in the winter, and that Respondent never provided tool insurance. I conclude such conduct was an unlawful solicitation of grievances in violation of Section 8(a)(1). *DBM, Inc.*, 304 NLRB 145 (1991). Jim Ippolito made a list of McQuade's complaints and then promised him he would take care of the tool insurance and give him and his father \$2000 per year for an IRA. I find such conduct to be a promise of benefits in violation of Section 8(a)(1). *Pony Express Courier Corp.*, 283 NLRB 868 (1987).

Sometime in early November, McQuade Jr. was summoned into Jim Ippolito's office. All four Ippolitoes were present. Jim Ippolito waved what McQuade Jr. perceived to be a union contract in his hand and said that he wasn't signing any union contract and he didn't give a damn if everyone walked out. I conclude such statement constitutes a threat to refuse to bargain with the Union in violation of Section 8(a)(1). *Kona 60 Minute Photo*, 277 NLRB 867 (1985).

Several days later Vincent Ippolito came into the parts room where several employees, including McQuade Jr., were present. Ippolito stated that he knew the guys in the shop were stealing from him and that it was happening at night. McQuade Jr. stated that this was not true. Ippolito then specifically accused McQuade Jr. of stealing. McQuade Jr. and Sr. both had keys to Respondent's facility.

Shortly afterward McQuade Jr. and Sr. met with Jim Ippolito in his office. Both McQuades turned in their keys to Ippolito. McQuade Jr. told Jim Ippolito that if Respondent thought he was stealing, he could have his keys. Ippolito took the keys and stated that he was changing the working hours for the shop employees and if they didn't like it they could leave. Ippolito told the McQuades that from now on all shop employees would work from 7:30 a.m. to 4:30 p.m. Monday through Friday. Previously the shop employees worked a schedule which allowed them to work from 8 a.m. to 4 p.m., Monday through Saturday 1 week and then work from 8 a.m. to 6 p.m. the following Monday through Thursday, from 8 a.m. to 4 p.m. on that Friday and have Saturday off. Ippolito then stated that also from now on the lunch period would be split, with half the crew taking an early lunch and the other half taking a later lunch. Further, the employees would no longer be paid for their lunch period, or their 15-minute break period. Previously the entire crew took their lunch period at the same time, and were paid for this half-hour lunch period, and the 15-minute break. Ippolito further stated that there would no longer be any overtime work. These changes went into effect the following day. Moreover, Respondent failed to advise the Union concerning these unilateral changes. As a result of the change in hours some employees had their working hours reduced from 48 to 40 hours.

General Counsel contends that the above changes constitute a violation of Section 8(a)(1) and (3). General Counsel has the burden of proving that the employees union activities were a motivating factor in such alleged discrimination. Once such motivating factor is established, the burden of proof shifts to Respondent to establish that the same action would have taken place in the absence of the employees protected activities. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1080 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

General Counsel has established a very strong *prima facie* case that the above unilateral changes were discriminatory. This is established by the 8(a)(1) activities of Respondent, the unlawful withdrawal of recognition, and its refusal thereafter to bargain with the Union as the lawfully designated and recognized bargaining representative of Respondent's employees in violation of Section 8(a)(1) and (5) of the Act as set forth and described above. Respondent, in its brief submitted no reasons for any of the changes described above. Accordingly, I conclude that Respondent has failed to meet its *Wright Line* burden and further conclude that by such unilateral changes, Respondent violated Section 8(a)(1) and (3) of the Act. Further, since the Union was at the time the recognized bargaining agent of Respondent's employees, such unilateral changes constitute a violation of Section 8(a)(1) and (5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962).

On January 31, 1991, the four Ippolitoes met with their transfer and shop employees. Jim Ippolito led the meeting. He told the assembled employees that they gave him more problems than anyone in Respondent's entire facility, and if they didn't watch out he would close his facility like Benedetto, a customer from whom Respondent purchased supplies. Ricky Ippolito then told the employees that "[t]his is a blue collar job and if you don't like it you can leave." I conclude that such conduct constitutes a threat to close the shop and an implied threat of discharge because his employees had engaged in activities on behalf of the Union in violation of Section 8(a)(1).

Ted Botsucos was employed by Respondent as a transfer station employee for a period of 12 years. During this period of employment Botsucos was terminated or quit about eight times. However, each time Botsucos applied for his job, Respondent rehired him.

Some time during the latter part of January 1991, Botsucos was working on a bobcat in the transfer station. Vincent Ippolito came into the transfer station and on observing Botsucos working, Ippolito told Botsucos to work faster. Botsucos replied that he was working as fast as he could, but that they were short staffed since some employees were absent. Ippolito replied that if he didn't like his job he could leave. Botsucos responded that if he didn't like his job he wouldn't have come to work. About an hour later, Vincent Ippolito returned to the transfer station and told Botsucos that he was being laid off effective immediately because business was slow. Botsucos testified that at the time of his layoff, the transfer station was busy.

Jim Ippolito testified that with the beginning of winter, business usually slows down. On top of the usual slowdown, Respondent recently lost one of their contracts. Thus they did not have enough work and they laid off about five employees. Botsucos had the least seniority. However, there is no evidence as to the classifications of the employees who were laid off. Moreover, within 3 weeks two new employees were hired to work in the transfer station, and a short time later, an additional employee was hired to work in the transfer station. Botsucos was never recalled. Respondent contends that Botsucos was not recalled because he had falsified an insurance claim in 1990. In this connection, Botsucos in filing a claim for alcohol treatment indicated that he had not filed a similar claim before. Respondent's health plan allowed one claim for such treatment during the employee's lifetime. In fact Botsucos' claim filed in 1990 was the second claim filed



by him for an alcohol rehabilitation program. Botsucos contends that he mentioned this fact to Jim Ippolito and Ippolito told him to file it anyway, and acting on Ippolito's advice he indicated in the application that he had not been in such program before. In view of my unfavorable impression of Jimmy Ippolito's credibility I credit Botsucos' testimony. On February 14, 1991, Respondent's insurance carrier sent Respondent a letter which states as follows:

During the course of our routine claims investigation on the above employee/dependent information was obtained which had it been disclosed at the time of application, would have precluded coverage.

The letter is ambiguous as to whether the insurance carrier merely disallowed the claim, or refused to cover Botsucos further. In any event Respondent contends that it refused to recall Botsucos because he was uninsurable.

General Counsel contends that Botsucos was discriminatorily laid off on January 10, 1991. The evidence established that notwithstanding the passage of time from on or about August 16 through on or about November 7, 1990, Respondent engaged in a systematic commission of unfair labor practices. On or about November 7, 1991, Respondent made a number of discriminatory unilateral changes involving the working conditions of employment of its unit employees. Thus, union animus is established, and I conclude that it logically extended into January 1991. The evidence further established that Botsucos signed a union card and was one of the employees who attended the union meeting. Moreover, Respondent's knowledge of Botsucos union activity can reasonably be inferred from Respondent's unlawful interrogation of McQuade Jr. wherein McQuade Jr. stated that all the employees had signed union cards. Moreover, the credible evidence established that Botsucos was informed of his layoff in the middle of a workday and following his altercation with Vincent Ippolito. I find such timing to be highly suspicious and strongly suggestive that the layoff was for discriminatory reasons. *Smedberg Machine & Tool*, 249 NLRB 534 (1980). Moreover, although Respondent admittedly lost one of its customers, Botsucos credibly testified that at the time of his layoff, the transfer station was busy. Further, the failure to recall Botsucos strongly supports that his layoff was discriminatory. In this connection, notwithstanding the loss of one of its customers, Respondent within a few weeks hired two new replacement transfer station employees and a short time later, a third employee. Botsucos was a long-time employee of Respondent who had quit or been terminated by Respondent during his 12-year employment, but had always been allowed to return.

Respondent contends that Botsucos was not recalled because he was not insurable under Respondent's health plan. During the period shortly after his layoff Respondent had received notification from the insurance carrier who covered Respondent's employee health plan that Botsucos could not be covered on Respondent's health plan for an alcohol rehabilitation program he had recently completed because he had previously been covered for such a program and the terms of their policy limited such coverage to one such program per employee during the life of such coverage. Botsucos had indicated on his application for insurance coverage that he had received no prior coverage for an alcohol rehabilitation

program. However, the letter received by Respondent from the insurance carrier is ambiguous as to whether Botsucos was totally uninsurable or whether the insurance carrier merely was refusing to cover this particular claim. In either case, I know of no reason why Botsucos' uninsurability, if in fact he was uninsurable, would preclude his employment. Thus, I find Respondent's defense without merit. Rather, it reinforces my conclusion that his discharge was discriminatorily motivated. Accordingly, I conclude Botsucos was discriminatorily discharged in violation of Section 8(a)(1) and (3).

Iva Newman was employed by Respondent as a welder for about 5 years. On or about the first week in February 1991, McQuade Jr. and Newman decided to play a joke on DesMoines Chaney, because he owed them money and had not repaid his loan. In this connection they hid his tools. When Chaney came to work the following day and he was unable to find his tools he reported his tools as stolen to Vincent Ippolito who searched the work area with Chaney before reporting the matter to the police. A short time afterward, Newman told Ippolito that he and McQuade Jr. had hid Chaney's tools, why they had done so, and where the tools were hidden. The tools were reclaimed by Chaney, and nothing further was said nor was any action taken against McQuade Jr. or Newman. The following morning McQuade and Newman were called into the office where they met with the four Ippolitoes. Notwithstanding Newman's credible testimony that he told Vincent Ippolito of the joke, the Ippolitoes accused both employees of stealing Chaney's tools and told them they should have handled Chaney's debt outside the shop. Vincent Ippolito then told the employees that if they didn't like their job they could leave. Newman protested in a loud voice that they didn't steal anything. The Ippolitoes said nothing further, and Newman believing the meeting was over started to leave. At this point Vincent Ippolito told Newman to get his things and leave. McQuade Jr. was not disciplined. Respondent's version of the events is not significantly different, except that Vincent Ippolito testified that when Newman left he went after him and told Newman to come back to the office and when Newman kept on going, Vincent told him to get his things and get out. In view of my credibility resolutions concerning the Ippolitoes and my extremely favorable impression concerning Newman's credibility I credit Newman's testimony. Moreover, Respondent's statement of position letter described above significantly contradicts their testimony at trial.

There is no evidence that either McQuade Jr. or Newman had ever been disciplined before. Respondent admitted that both employees were excellent employees.

General Counsel contends that Newman was discriminatorily discharged on February 4, 1991. Newman's activities were that he signed a union card. For the same reasons I concluded Respondent had knowledge of Botsucos' union activity and general union animus, I similarly conclude as to Newman. Moreover Newman was a long-time employee of 5 years, without a break in his employment. Newman was also an exceptional worker with no criticism or warnings of any kind in his work record. As set forth above, Newman and McQuade Jr. were summoned to Respondent's office the morning following their joke of hiding Chaney's tools. That the Ippolitoes were aware that the act of hiding Chaney's tools was intended to be a joke is established by

the credible testimony of Newman who told Vincent Ippolito about it shortly after Chaney was unable to find his tools. Notwithstanding the Ippolitoes' knowledge of the joke, they proceeded to accuse the two employees of stealing Chaney's tools. They protested that they hadn't stolen anything and when the Ippolitoes said nothing, Newman left, thinking the meeting to be over. Respondent contends in its brief that it was Newman's act of leaving the meeting without permission that triggered his discharge. The Board has held that the discharge of an excellent worker for minimal insubordination is evidence of a discriminatory motive. *Hinky Dinky Super Markets*, 247 NLRB 1176 (1980). Moreover, I would conclude that Respondent provoked Newman's response even if I credited the Ippolitoes' testimony as to what took place at the meeting. Thus, I conclude that General Counsel has established a strong prima facie case.

As set forth above, Respondent's defense is that Newman was discharged because he left the meeting without permission. However, Respondent's statement of position in defense of the charge states that Newman was discharged because during the meeting he began screaming and cursing at the Ippolitoes. No such evidence was established at the trial of this case. I conclude Respondent's conflicting defenses fail to meet their *Wright Line* burden and further conclude that Respondent discriminatorily discharged Newman in violation of Section 8(a)(1) and (3) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent is, and has been at all times material, an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. An appropriate unit for bargaining is:

All operators, welders, mechanics and painters employed by Respondent at its New Jersey facility excluding all office clerical employees, truck drivers professional employees, guards, and supervisors as defined by the Act.

4. Since October 25, 1990, the Union has been, and is the exclusive collective-bargaining representative of the unit described above, for purposes of collective bargaining with respect to wages, hours, and other conditions of employment.

5. By interrogating their employees about their membership in, or activities on behalf of the Union, Respondent has violated Section 8(a)(1) of the Act.

6. By threatening its employees with a loss of overtime work because of said employees' membership in or activities on behalf of the Union, Respondent has violated Section 8(a)(1) of the Act.

7. By soliciting grievances and promising its employees improved working conditions because of the employees' membership in or activities on behalf of the Union, Respondent has violated Section 8(a)(1) of the Act.

8. By stating to its employees that it would be futile to select the Union as their bargaining representative, and that Respondent would never sign a collective-bargaining agreement with the Union, Respondent violated Section 8(a)(1) of the Act.

9. By threatening its employees with plant closure and other unspecified reprisals because of their membership in and activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

10. By changing its employees' hours of work, and ceasing its practice of paying its employees for lunch and break time, and by removing a telephone used for employees because of the employees' membership in and activities on behalf of the Union, Respondent has violated Section 8(a)(1), (3), and (5) of the Act.

11. By withdrawing recognition from the Union, as the collective-bargaining representative for the employees described in the unit above, Respondent violated Section 8(a)(1) and (5) of the Act.

12. By discharging its employees, Ted Botsucos and Iva Newman, because of their membership in and activities on behalf of the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

#### THE REMEDY

Having found Respondent has engaged in certain unfair labor practices, I shall recommend it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Respondent shall be required to bargain with the Union in good faith as the exclusive representative of the unit of employees described above concerning terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed agreement. Respondent shall also be required to restore the terms and conditions of employment. Respondent shall also be required to make whole the employees for any loss of wages or other benefits suffered by Respondent's implementation of its November 1990 unilateral changes in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth and computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Since I have also found that Respondent discriminatorily discharged its employees Botsucos and Newman, I shall recommend Respondent make whole the employees together with interest as set forth above from the date of their termination until their reinstatement or valid offer of reinstatement.

I shall also recommend that Respondent expunge from its records any reference to the discharges of the above-named employees, and to provide written notice of such expunction to those employees, and to inform them that Respondent's unlawful conduct will not be used in personnel action concerning them. *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

#### ORDER

The Respondent, Vincent M. Ippolito, Inc. and Bergen Enterprises Co., Teaneck, New Jersey, its officers, agents, successors, and assigns, shall

<sup>1</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing and refusing to recognize and bargain collectively with Local 825, International Union of Operating Engineers, AFL-CIO (the Union) with respect to wages, hours, and other terms and conditions of employment of the employees in the unit set forth below:

All operators, welders, mechanics and painters employed by Respondent at its New Jersey facility excluding all office clerical employees, truck drivers professional employees, guards, and supervisors as defined by the Act.

(b) Withdrawing recognition from the Union as the exclusive collective-bargaining representative for its employees in the unit described above.

(c) Unilaterally changing its employees' hours of work, and ceasing its practice of paying its employees for lunch and break time, and removing a telephone used for employees because of the employees' membership in and activities on behalf of the Union.

(d) Stating to its employees that it would be futile to select the Union as their bargaining representative, and that Respondent would never sign a collective-bargaining agreement with the Union.

(e) Interrogating their employees about their membership in, or activities on behalf of, the Union.

(f) Threatening its employees with a loss of overtime work because of the employees' membership in or activities on behalf of the Union.

(g) Threatening its employees with plant closure and other unspecified reprisals, because of their membership in, and activities on behalf of the Union.

(h) Soliciting grievances and promising its employees improved working conditions because of the employees' membership in or activities on behalf of the Union.

(i) Discharging its employees because of their membership in and activities on behalf of the Union.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain on request with the Union in good faith as the exclusive bargaining representative of the employees in the unit described above concerning terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed agreement.

(b) Offer to Ted Botsucos and Iva Newman full and immediate reinstatement to their former or substantially equivalent position of employment, without prejudice to their seniority or other rights and privileges previously enjoyed.

(c) Make the above employees whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of this decision.

(d) Restore the terms and conditions that were in effect when Respondent changed its employees' hours of work and ceased its practice of paying its employees for lunch and break time and make the employees whole for such monetary loss in the manner set forth in the remedy section of this decision.

(e) Replace the telephone usually used by employees at Respondent's facility.

(f) Remove from its files any reference to the terminations of Botsucos and Newman and notify them in writing that this has been done and that evidence of their unlawful terminations will not be used as a basis for future personnel actions against them.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its Tenafly, New Jersey office and facility copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."